

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GLASERS LUMBER COMPANY,

Plaintiff-Appellant,

v

DTP ASSOCIATES, LLC, and FLAGSTAR  
BANK, FSB,

Defendants-Appellees.

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UNPUBLISHED

August 11, 2005

No. 261780

Ingham Circuit Court

LC No. 03-001791-CH

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting partial summary disposition in favor of defendants DTP Associates, LLC, and Flagstar Bank, FSB. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

From March 1, 2001, through June 29, 2001, plaintiff supplied materials for the construction of a building by non-participating defendant LandEquities Comm Construction, d/b/a LandEquities Corporation. The cost of the materials was \$9,952.43. In July 2002, DTP took ownership of the property. On or about July 18, 2002, Magna Interior Systems, Inc, a tenant, requested that an insulated metal door be provided to replace an existing door. Plaintiff provided the door, but did not install it. The cost of the door was \$413.40.

On October 10, 2002, plaintiff filed a construction lien against the property in the amount of \$11,861.77. That amount included \$9,952.43 for the materials delivered in 2001, \$1,495.94 in finance charges for the amount owed on the materials delivered in 2001, and \$413.40 for the door delivered in July 2002.

On October 9, 2003, plaintiff filed suit naming as defendants LandEquities, DTP, and Flagstar Bank, FSB, which held a mortgage on the property. Plaintiff alleged foreclosure of lien (Count I), breach of contract (Count II), and unjust enrichment (Count III), and sought judgment in the amount of \$11,861.77, plus costs and fees. DTP moved for partial summary disposition of Counts I and III pursuant to MCR 2.116(C)(10), arguing that plaintiff's lien for the cost of the

materials supplied in 2001 was untimely because it was not filed within ninety days after the last date on which the materials were furnished, as required by MCL 570.1111(1), and that plaintiff could not sustain a claim for unjust enrichment because an express contract covered the same subject matter.<sup>1</sup> The trial court granted summary disposition of Counts I and III in favor of DTP and Flagstar, reasoning that the statutory requirement that a lien be filed within ninety days after the last date on which materials were furnished would be frustrated by allowing a contractor to tack together indefinite periods of delay and inactivity.<sup>2</sup>

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 613 (2000).

Under the Construction Lien Act, MCL 570.1101 *et seq.*, a lien to secure payment for materials provided must be filed within ninety days after the last date the materials were supplied. MCL 570.1111(1). The purposes of the ninety-day limitation period are to prevent stale claims and to protect defendants from the fear of protracted litigation. *Northern Concrete Pipe, Inc v Sinacola Companies-Midwest, Inc*, 461 Mich App 316, 322; 603 NW2d 257 (1999).

In order to establish a claim of unjust enrichment, a plaintiff must show: (1) the receipt of a benefit by the defendant from the plaintiff; and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. If the plaintiff makes the requisite showing, the law will imply a contract to prevent the defendant's unjust enrichment. A contract will be implied only if there exists no express contract covering the same subject matter. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

We affirm. Plaintiff and LandEquities entered into a verbal agreement pursuant to which plaintiff was to supply materials for the construction of a building. Plaintiff supplied materials from March 1, 2001, through June 29, 2001. Plaintiff was not paid for the materials, and did not file a construction lien within ninety days of June 29, 2001. In his affidavits, plaintiff's vice president of operations stated that plaintiff and LandEquities considered the construction of the building and the "build-out" of tenant spaces to be covered by a single contract. In July 2002, plaintiff supplied a metal replacement door at the request of a tenant. However, no evidence showed that the parties contemplated that the furnishing of replacement materials at the request

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<sup>1</sup> DTP did not contest the validity of plaintiff's construction lien for the amount of \$413.40. Flagstar Bank concurred in the motion filed by DTP.

<sup>2</sup> Subsequently, the trial court entered a default judgment against LandEquities, thereby resolving the last remaining claim in the case.

of a tenant would be covered by the original verbal contract, regardless of how much time had lapsed since the last date materials were provided for the initial construction of the building.

Plaintiff's reliance on *M D Marinich, Inc v Michigan National Bank*, 193 Mich App 447; 484 NW2d 738 (1992), is misplaced. In that case, the plaintiff, a general contractor, agreed to complete a building project and to correct defective work performed by another general contractor. After work on the project was halted, the plaintiff filed a construction lien. We affirmed the trial court's decision giving the plaintiff's construction lien priority over the defendant's mortgage, noting that pursuant to MCL 570.1119(3), a construction lien has priority over a mortgage "recorded after the commencement of the construction work." *Id.* at 454. The *Marinich* Court held that the plaintiff's construction lien related back to the first physical improvement made for the project, notwithstanding the fact that the plaintiff did not actually perform that work. *Id.* at 456. *Marinich, supra*, is distinguishable from the instant case in that in that case, the work performed by the plaintiff and its predecessor was clearly part of the same project. Here, no evidence showed that plaintiff's furnishing of materials for the initial construction of the building and its subsequent furnishing of a replacement door at the request of a tenant were part of the same project. The trial court correctly concluded that plaintiff's failure to file a construction lien within ninety days of June 29, 2001, precluded plaintiff's claim for recovery of the amounts owed to it for materials furnished during the period March 1, 2001 through June 29, 2001. MCL 570.1111(1); *Northern Concrete Pipe, supra*.

The parties did not have a written contract pursuant to which plaintiff was to furnish materials for the project; however, the cost of the materials was specified in written invoices generated pursuant to the parties' verbal agreement. We conclude that under the circumstances, the trial court correctly granted summary disposition of plaintiff's claim for unjust enrichment. *Belle Isle Grill Corp, supra*.

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Donald S. Owens